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In The

Supreme Court of the United States

October Term, 1984

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, AFL-CIO,

Petitioner,

vs.

NATIONAL ELEVATOR INDUSTRY, INC.,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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COUNTER STATEMENT OF QUESTION PRESENTED

Whether the District Court and Court of Appeals erred in holding that an arbitrator's interpretation of a wage formula drew its essence from the collective bargaining agreement where the arbitrator found that the language of the collective bargaining agreement did not clearly or definitively resolve a dispute relating to a wage formula and relied upon evidence of the history of bargaining to ascertain the intent of the employer and the union in negotiating the wage formula.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

COUNTER STATEMENT OF THE FACTS

1. Parties and History of Collective Bargaining

National Elevator Industry, Inc. ("NEII") is a multi-employer trade association which represents employers engaged in the

elevator business. The International Union of Elevator Constructors ("IUEC") is an international union representing elevator mechanics and helpers employed by elevator companies throughout the United States. There is a long history of collective bargaining between NEII and the IUEC. The collective bargaining agreement is known as the "Standard Agreement" in that it covers the wages, hours and working conditions of elevator mechanics and helpers on a nationwide basis.

2. The Atlantic City Formula

Although the Standard Agreement applies on a nationwide basis, the wage rates paid to mechanics and helpers vary from one geographic area to another.

In 1921, the parties agreed upon a wage formula which has come to be known as the "Atlantic City formula". Although details of the Atlantic City formula have changed from time to time, the basic concept since 1921 has always been the same, namely, that the wage rate paid to the elevator constructor is based upon the wage rates of the other building trades in the geographic area in which the elevator constructor works.

Under the Standard Agreement, the wage formula is calculated separately for each geographic area covered by the IUEC's local unions. Over the last several years there have been approximately 98 wage changes calculated under the Atlantic City formula each year. The calculations have been routinely made by the NEII staff in New York City, which then sends written notification of the amount and effective date of the new wage rate to the IUEC, the IUEC local union and the individual employers that are engaged in business in the geographic area for which the wage rate is applicable.

3. Reductions in Wage Rates in Cedar Rapids in 1983

In response to the competition from non-union shops in the Cedar Rapids area, the building trades unions in Cedar Rapids agreed to accept substantial wage rate reductions in the spring of 1983, as follows:

	WAGES	FRINGE BENEFITS	TOTAL
Iron Workers:	$2.85 per hour reduction	$.06 per hour increase	$2.79 total reduction
Carpenters:	$2.85 per hour reduction	$.05 per hour increase	$2.80 total reduction
Sheetmetal Workers:	$3.08 per hour reduction	$.50 per hour increase	$2.58 total reduction
Bricklayers:	$1.50 per hour reduction	$.02 per hour increase	$1.48 total reduction
Electricians:	$2.62 per hour reduction	No Change	$2.62 total reduction
Plumbers:	$2.80 per hour reduction	$.40 per hour increase	$2.40 total reduction
Plasterers:	$2.35 per hour reduction	No Change	$2.35 total reduction

Applying the Atlantic City formula to the Cedar Rapids area, NEII determined that the wage rate for the elevator constructors in the Cedar Rapids area should be $12.54 per hour. This was

a reduction of $2.54 per hour from the prior wage rate for an elevator mechanic in Cedar Rapids.

On August 1, 1983, NEII gave written notice of NEII's desire to change the wage rate in Cedar Rapids. The parties met to discuss the proposed change on August 10. At this meeting the IUEC did not deny that the other building trades in Cedar Rapids had in fact agreed to wage rate reductions. However, the IUEC took the position that under the Atlantic City formula no reduction was permissible other than a 31-cent reduction for fringe benefits.

The IUEC then sought to obtain an injunction barring implementation of the wage rate change in the District Court. After the injunction was denied, the change was implemented on August 31, 1983.

4. Positions of the Parties at the Arbitration Level

At the arbitration level, the *IUEC acknowleged that the Atlantic City formula as written in 1921 permitted either increases or decreases in the wage rates of an elevator constructor,* depending upon whether the average wage rates of the other building trades rose or fell. The IUEC argued, however, that there was a modification of the Atlantic City formula in 1967, by which modification the wage rate of the elevator constructor became a guaranteed wage rate not subject to reduction even if the other building trades in the same locality agreed to accept wage rate reductions.

NEII agreed with the IUEC that the Atlantic City formula as originally written permitted either increases or decreases in the wage rate and also agreed that the Atlantic City formula was modified in 1967. However, NEII flatly denied that the parties ever agreed that the Atlantic City formula was modified so that it became a formula by which the elevator constructors only used

the average of wage rates for other trades if that average went up but did not use the average if the average went down. NEII took the position that during protracted negotiations over a period of six months in 1967, including a seven-week strike, this concept was *never* discussed by the parties. NEII took the position that in 1967 the parties modified the Atlantic City formula for only one reason:

> *to establish a method of accounting for the cost of fringe benefits under the formula.*

5. Events Leading Up to 1967 Negotiations

As shown above, the issue in the arbitration turned upon the intent of the parties in modifying the Atlantic City formula in 1967.

Up until the early 1950's, most building trades locals throughout the United States negotiated collective bargaining agreements under which all or virtually all of the total compensation paid to the tradesmen was paid in the form of wages. Prior to the 1950's, the collective bargaining agreements in the building trades generally did not provide for so-called "fringe benefits" such as pension, health and welfare, paid vacations and paid holidays.

Beginning sometime in the 1950's the various building trades locals began to negotiate provisions for fringe benefits in their collective bargaining agreements. As more and more of the building trades locals began to include fringe benefits in their collective bargaining agreements, questions arose as to the proper method of accounting for the cost of fringe benefits under the Atlantic City formula.

In 1964, 1965 and 1966, there were several different arbitration awards dealing with questions concerning the proper accounting

of fringe benefits under the Atlantic City formula. In 1964, Arbitrator Peter Seitz held in two lengthy opinions that the cost of vacation and welfare benefits which have been deducted from the negotiated wage rate of a building trades local should be included in the local's wage rate for the purpose of the Atlantic City formula. In 1965, Arbitrator Ronald Haughton held that the cost of vacation and holidays which are established independently of the wage rate of a building trades local should be excluded from the local's wage rate for the purpose of the Atlantic City formula. In 1966, Arbitrator Nathan Cayton held that the cost of pension benefits which are deducted from the negotiated wage rate of a building trades local should be included in the wage rate of the building trades local for the purpose of the Atlantic City formula.

These four arbitration awards did not resolve the problems of accounting for fringe benefits to the complete satisfaction of either the IUEC or NEII for several reasons. First, the situation as to each building trades local was transitory. A particular local could be considered a "Seitz", "Haughton" or "Cayton" type of local with respect to one type of fringe benefit in one year and then change its category in the next year by rewording its collective bargaining agreement. This created serious administrative problems and also created the possibility of results which could be regarded as inequitable by the employers or the employees. Second, the IUEC took the position that a change in the Atlantic City formula was necessary to keep the elevator constructors from falling behind the other building trades because of the fact that these other trades had begun to allocate a greater proportion of their total compensation package to fringe benefits.

6. Proposed Solutions by Parties in the 1967 Negotiations

In the 1967 negotiations, the IUEC and NEII took entirely different approaches to the fringe benefit question. Finally, after

a seven-week strike, the parties reached agreement upon a compromise. First, the formula adopted the reasoning of the Seitz, Haughton and Cayton arbitration awards but made an important addition to these awards by providing that monies considered to be part of the wage rate of a particular local under the Seitz and Cayton decisions would continue to be so considered despite any rewording of the collective bargaining agreement by that local, and that monies considered to be a fringe payment under the Haughton decision would continue to be so considered despite such rewording.

Next, the formula itself was recast into eight steps to separately compute (a) the wage rates of the Atlantic City trades and (b) the increases in fringe benefits for those trades.

There were several other changes in the wage formula, the details of which are beyond the scope of this brief. In summary, *all* of these additional changes dealt with the establishment of a method of accounting for the cost of fringe benefits.

7. Summary and Analysis of Arbitrator Goldberg's Opinion

Arbitrator Goldberg expressly held that "regardless of how substantial the burden of proof that is placed on the Employers, they have sustained that burden." However, like many other arbitrators, in his opinion Arbitrator Goldberg concentrated on expressing his reasons for rejecting the IUEC's contentions. Inasmuch as Arbitrator Goldberg's opinion is reprinted in its entirety in the Appendix to the IUEC's petition for certiorari, it is unneccessary to repeat herein Arbitrator Goldberg's responses to the IUEC's arguments. However, there was substantial evidence before Arbitrator Goldberg which affirmatively supported NEII's position which Arbitrator Goldberg passed over lightly in his opinion or did not mention at all. This evidence may be summarized as follows:

A. Analysis of the revision of the wage formula shows that each and every substantive change in 1967 was a change relating to the method of separately accounting for the cost of fringe benefits.

B. NEII precisely followed all of the mathematical steps of the wage formula in reaching the mathematical result that the new wage rate for the mechanics in Cedar Rapids should be $12.54 per hour. The IUEC's argument that $12.54 is not the correct hourly wage rate is a purely semantic argument in which the IUEC takes the word "increase" out of context and attempts to make one word in a complicated formula paramount to the remainder of the formula. Putting the IUEC's argument in its best light, the use of the word "increase", in context with the rest of the wage formula, would arguably create an ambiguity in the wage formula.

Arbitrator Goldberg correctly recognized that the wage formula itself does not clearly and unambiguously support the IUEC's contention and thus he examined the other evidence of the intent of the parties. His careful examination of all of such evidence showed that NEII had sustained any burden of proof which might be placed upon it.

The IUEC virtually ignores a transcript of 196 pages and 21 employer exhibits which demonstrate beyond cavil what the IUEC itself understood the contract to be in 1967. The IUEC entirely ignores the 46-year bargaining history which preceded the collective bargaining negotiations in 1967. The IUEC ignores several other arbitration cases which support NEII's position. In essence, the IUEC makes the same narrow semantic argument to this Court which the Arbitrator, the District Court and the Court of Appeals rejected on the basis of the record as a whole.

C. The IUEC's contemporaneous statements of its bargaining objectives in 1967 support NEII's position. Arbitrator Goldberg's

opinion quotes from the explanation which the IUEC gave to its members after the negotiations were concluded. In addition, during the seven-week strike, the IUEC published letters addressed "To the Contract Service Customers of Struck Elevator Companies." The first two paragraphs of these letters state as follows:

> "To the Contract Service Customers of Struck Elevator Companies
>
> * * *
>
> You are entitled to know the truth about our strike and our wage demands. *Every local of the Elevator Constructors has, since 1921, determined the wage rate of its members by a formula of averaging the wage rate of five highest of seven building trades unions in their areas.* The seven unions are: Bricklayers, Ironworkers, Electricians, Plumbers, and Steamfitters, Plasterers, Carpenters, and Sheet Metal Workers. *With the development of fringe benefits both NEMI and the Elevator Constructors have recognized that a new formula must be developed. Our dispute is over what it should be. We want to use the same formula but average increases in total compensation. We can assure you that such a formula will only keep the Elevator Constructors on a par with similar building trades unions."* (Emphasis supplied.)

The letter clearly says:

1. That both IUEC and NEII recognized that it was necessary to develop a new formula because of *"the development of fringe benefits."*

2. That IUEC wanted "to use the same formula but average increases *in total compensation.*"

3. That the formula desired by the IUEC would *"only"* keep the elevator constructors *"on a par"* with similar building trades unions.

The IUEC wanted to use "the same formula" — which the IUEC concedes in its letter was an "averaging" formula. The effect of including fringe benefits in the calculations would, according to the IUEC, "only" keep the elevator constructors "on a par" with similar building trades unions.

The phrase "on a par" cannot reasonably be construed as giving the elevator constructors *guaranteed* wage rates not subject to reduction even if, as in Cedar Rapids, the wage rates of similar building trades suffered substantial reductions.

D. Part of the evidence before Arbitrator Goldberg was a prior arbitration award in which the IUEC took a position which is inconsistent with the position taken by the IUEC in the instant case. As recently as April 2, 1982, Arbitrator Sylvester Garrett issued an opinion and award dealing with the issue of whether "travel pay" paid to other building trades unions should be included as part of the wage rate of the other building trades unions for the purpose of the Atlantic City formula. Arbitrator Garrett's findings, as well as much of the IUEC's arguments in that case, support NEII's position in the instant case.

Thus, Arbitrator Garrett *described the IUEC's contentions* in the case as follows:

> "The history of the Article V wage formula, first adopted in 1921, is cited to support this conclusion. Originally, the term 'wage rate' did not require

any definition since virtually all building trades employees in 1921 were paid a single hourly wage which constituted all of their compensation for services rendered. *Thus, the intent of the parties in 1921 clearly was to have the total compensation of the Elevator Constructors determined by averaging the total compensation of the other top trades."*

"This basic intent has remained the same over the years in the Union view, even though the parties have had to modify the wage formula in response to innovations in the construction industry. Thus, in 1967 the formula was modified to take into account the indirect form of compensation known as fringe benefits. The fringe increases of other crafts now are computed separately from their wage rate increases and both are plugged into the formula at a different step (Article V, Steps 2-4)."

"In short, Article V, as now written, divides the other crafts' total compensation into a direct wage category and an indirect fringe benefit category without changing the basic intent."

* * *

"For example, the parties modified the formula in 1967 to take into account the indirect form of compensation known as fringe benefits. Tr. 18-19. The other crafts' fringe increases are now computed separately from their wage rate increases, and both are plugged into the formula at a different step. Art. V, Steps 2-4. *Thus, in its present form Article V divides the other crafts'*

> *total compensation into a direct wage category and an indirect fringe benefit category; but the intent is still the same:* all of the other crafts' compensation for services rendered is to be used in computing the wages of the elevator constructors."

Arbitrator Garrett then made the following finding:

> "It thus is of more than passing interest that *only one basic change appears to have been made in the general scheme of Article V since 1921.* That change occurred when Article V was revised in 1967 to recognize that 'fringe benefits' had emerged as a major monetary element in most building trades agreements, usually negotiated as a significant portion of a 'package' settlement. Since 1967, therefore, Article V has contemplated that 'increases in fringe benefits' (for the respective building trades Unions) will be calculated in cents per hour and plugged into the wage rate determination formula, commencing at Step 4."

The IUEC's brief to Arbitrator Garrett contains the following representations:

> "The agreement expresses the wages of elevator constructors as a function of the wages paid to other crafts in the same locality. Under the Article V formula, local elevator constructors' wages are equal to a *modified average* of the wages for the four most highly paid other crafts in the local area." (Emphasis supplied.)

* * *

"The formula requires the use of a modified method of averaging the wage rates for the four highest crafts which includes a variety of rather complex adjustments." (Emphasis supplied.)

"Indeed, when the analogue to the Article V wage formula was first adopted in 1921, the term 'wage rate' did not require any elaborate definition, because virtually all building trades employees were paid a single hourly wage which constituted all of their compensation for services rendered. *The intent of the parties at that time was clearly to have the total compensation of the elevator constructors determined by averaging the total compensation of the other top trades."*

"This intent has remained the same over the years, although the parties have had to modify the wage formula in response to innovations in the construction industry. For example, the parties modified the formula in 1967 to take into account the indirect form of compensation known as fringe benefits. Tr. 18-19. The other crafts' fringe increases are not computed separately from their wage rate increases, and both are plugged into the formula at a different step. Art. V, Steps 2-4. Thus, in its present form Article V divides the other crafts' total compensation into a direct wage category and an indirect fringe benefit category; *but the intent is still the same:* all of the other crafts' compensation for services rendered is to be used in computing the wages of the elevator constructors." (Emphasis supplied.)

E. Finally, it is undisputed that during the strike in 1967 NEII proposed that, if the cost of fringe benefits were stripped

completely from the formula, NEII would negotiate for fringe benefits independently of the formula and also guarantee a 3% annual increase under the formula itself. The IUEC rejected this proposal. The IUEC termed the offer of a 3% guarantee "meaningless" because "with the exception of one or two locals, all local unions have gotten better than 3% a year under the Atlantic City Plan" as it existed prior to 1967. It would be anomalous, to say the least, to believe that the IUEC, which found an offer of a 3% guaranteed increase to be "meaningless", had as of one of its objectives in negotiations the elimination of the possibility of wage decreases under the formula.

ARGUMENT

I.

The District Court and Court of Appeals correctly applied the appropriate legal standard.

In its statement of the "question presented" in its petition for a writ of certiorari, the IUEC poses a question which makes the unwarranted assumption that Arbitrator Goldberg's opinion construes contractual language "to mean its very opposite." This is simply not the case. In effect, the IUEC is asking this Court to assume that the IUEC's interpretation of the collective bargaining agreement is the only possible interpretation and, based on this unwarranted assumption, to hold that Arbitrator Goldberg's award does not draw its essence from the collective bargaining agreement.

There is no dispute in the instant case concerning the standard which should be applied by a federal District Court in determining whether to confirm or vacate an arbitrator's award. Both parties urged the District Court to apply the test described in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363

U.S. 593 (1960), that is, to determine whether Arbitrator Goldberg's award "drew its essence" from the Standard Agreement.

The District Court held that:

> "After reviewing a 196-page transcript and voluminous exhibits, Goldberg handed down a careful, well-reasoned, 33-page decision in which he concluded that the terms of the collective bargaining agreement between the IUEC and the NEII allowed the employers to reduce the wages of elevator workers when the wages of other construction workers went down. Because this decision 'draws its essence from the collective bargaining agreement,' the Court, as explained above, cannot set it aside."
>
> * * *
>
> "Although the collective bargaining agreement speaks in terms of wage increases, Goldberg quite properly looked to the history of the agreement and found that the use of the word 'increases' was not in any way intended to bar decreases. He appropriately found that there apparently had never been any wage decreases in the construction industry in the past and so the subject of decreases had not been contemplated by either side during the negotiations that led to the signing of the contract. Based on the evidence before him, it cannot be said that Goldberg was incorrect in rejecting the IUEC's claim that some of the changes in the wording of the collective bargaining agreement were intended to eliminate the possibility of wage decreases."

* * *

"Goldberg interpreted the collective bargaining agreement in a manner consistent with the language, intent, and history of the contract."

The Court of Appeals affirmed the District Court "substantially for the reasons stated in the opinion of Judge Goettel."

In its petition for a writ of certiorari, the IUEC argues, in substance, that the District Court and the Court of Appeals misapplied the *Steelworkers* test. As noted *supra*, this is circular reasoning which begins with the unsupportable assumption that the IUEC's interpretation of the wage formula is the only possible interpretation.

The IUEC's argument in this case is purely a semantic argument. In the 1967 negotiations the parties never discussed the proposition that the formula should be changed so that there could never be a reduction in the wage rate of the elevator constructor even though the wage rates of the other building trades were reduced. The employers never agreed to such a concept. Even though there was a seven-week strike, this proposition was never discussed at the bargaining table. Indeed, it would be highly unlikely that such a discussion would ever have taken place in 1967 because at that time and for many years prior thereto every collective bargaining agreement in the building trades brought forth wage increases. The possibilty that wage rates in the building industry would generally decline was far from anyone's mind.

As noted before, it was certainly not one of the IUEC's stated objectives in the bargaining. Even after the 1967 Standard Agreement was signed, the IUEC never advised its members that the IUEC had achieved what it now claims it has achieved. On

the contrary, (1) what the IUEC told the employers in bargaining and (2) what the IUEC told the general public and (3) what the IUEC told its own membership was that the purpose of the changes in the collective bargaining agreement was to keep the elevator constructors "on a par" with other building trades unions. Keeping "on a par" with the other unions is a far different concept than the concept of guaranteeing that the wages of the elevator constructors would never be reduced under the formula, even though the wage rate of every other building trade union is reduced.

The record shows that in calculating the Cedar Rapids wage rate, NEII precisely followed the mathematical steps of the Atlantic City formula. The IUEC argues that the result achieved by following the mathematical steps of the formula must be rejected because, the IUEC argues, the result is not an "increase" in the wage rate of the elevator constructor. The IUEC's argument rests upon the contention that the use of the word "increase" in describing the result obtained under the formula is controlling over everything else in the formula.

The IUEC's argument ignores the fact that the mathematical steps of the formula support NEII's result. Putting the IUEC's argument in its best light, the use of the word "increase", in context with the rest of the formula, would arguably create an ambiguity in the formula. Any such ambiguity should be resolved by examining the intent of the parties during the 1967 negotiations, an examination which Arbitrator Goldberg found to overwhelmingly support NEII's position.

It must be emphasized that Arbitrator Goldberg correctly evaluated the importance of the fact that the IUEC *concedes that for 46 years,* from 1921 to 1967, the Atlantic City formula was an "averaging" formula. Thus, this is not a case in which Arbitrator Goldberg construed language to give it a meaning that

never previously existed in the industry. *Rather, Arbitrator Goldberg's analysis starts with the premise that the Atlantic City formula was for 46 years an averaging formula and the question is whether the evidence shows that the averaging concept was dropped from the Atlantic City formula and replaced by the concept of a guaranteed wage rate* which could only rise and never fall even though the other building trades unions negotiated wage rate reductions.

It has often been observed that collective bargaining agreements are not negotiated in a vacuum. Prior to the 1967 negotiations, both parties understood the essence of the Atlantic City formula to be a wage rate formula in which the wage rate for the elevator constructor was determined by averaging the wage rates of the other building trades unions in the same geographic locality. The IUEC acknowledges that under this basic averaging concept, the wage rate for the elevator constructors could rise or fall, depending upon the rates for the other trades. The Standard Agreement expressly provides that the formula negotiated in the 1967 negotiations is an amendment of the formula (for the reasons set forth above), not a repudiation of it nor the substitution of a wage rate guarantee for the averaging concept.

II.

The decision of the Court of Appeals for the Second Circuit is not in conflict with the decision of any other circuit.

In its argument to the Second Circuit, the IUEC cited the decisions of several other circuit courts which vacated an arbitrator's award in whole or in part. All of the cases cited by the IUEC are distinguishable from the instant case. The Second Circuit obviously saw no conflict between the affirmance of Arbitrator Goldberg's award and the cases relied upon by the IUEC. The Second Circuit did not find the issue in the instant case

to be of sufficient precedential value to even warrant an opinion. Both the Second Circuit and the District Court had no difficulty in discerning that Arbitrator Goldberg's Award "drew its essence" from the collective bargaining agreement, notwithstanding the fact that there have been other arbitration awards in other cases which have failed to meet this test. It is plainly inaccurate to state that the decision of the Second Circuit is in conflict with the decisions of other Circuits merely because the results reached in applying the *Steelworkers* test differ from case to case.

The IUEC cites *H.K. Porter Company Inc. v. United Saw, File and Steel Products Workers of America,* 333 F.2d 596 (3rd Cir. 1964) as an example of a situation in which the Third Circuit vacated a portion of an arbitrator's award. The *Porter* decision is not in conflict with the instant case. If anything, the general approach in the *Porter* case tends to support NEII.

Porter is a case in which past practice is accepted by the Third Circuit as a basis for modifying the clear and unambiguous terms of a pension plan in one respect but not accepted in another respect. The instant case is entirely different in that Arbitrator Goldberg did not find the modified wage formula to be clear and unambiguous. Rather, Arbitrator Goldberg turned to the history of negotiations between the parties in order to ascertain the intent of a complex wage formula because of the IUEC's claim of an apparent inconsistency between (1) the mathematical directions of the wage formula and (2) the characterization of the results of the mathematical directions.

The IUEC relies upon *Timken Company v. Local Union No. 1123, United Steelworkers of America,* 482 F.2d 1012 (6th Cir. 1973). This is also a case which supports NEII's position rather than the IUEC's position. In *Timken,* the Sixth Circuit overturned an arbitrator's award wherein an arbitrator substituted his judgment of a "voluntary quit" in place of an express definition

of the term in the collective bargaining agreement. In a footnote appearing at page 1015, the Sixth Circuit stated, in part, as follows:

> "In this regard, we intimate no view as to the merits, but, rather, *merely notice that even though the Arbitrator could have properly utilized sources outside the agreement for guidance and context,* the dearth of such information in his opinion makes it difficult to contradict the unambiguous language of the agreement. It is axiomatic that if the Arbitrator undertook to, in effect, amend the contract, to substitute his own discretion for that of the parties or to dispense his own brand of industrial justice, the enforcement of the award must be denied."

Unlike *Timken,* Arbitrator Goldberg painstakingly considered the *context* in which the wage formula was modified during the 1967 negotiations. Arbitrator Goldberg's analysis is precisely the articulated rationale which the Sixth Circuit found to be missing in *Timken.*

The IUEC cites *Milwaukee Typographical Union No. 23 v. Newspapers, Inc.,* 639 F.2d 386 (7th Cir. 1981), *cert. denied,* 454 U.S. 838 (1981) as an example of a case in which the Seventh Circuit refused to enforce an arbitrator's award. In *Milwaukee Typographical,* an arbitrator ordered an employer to negotiate over the "impact" of a new process, including negotiations as to "involuntary layoff, termination, bonuses and loss of overtime." *Milwaukee Typographical* at 393. It was not contended, nor did the arbitrator therein find, that the contract required bargaining on these subjects. Rather, the arbitrator therein simply included these additional items as subjects for bargaining in his award. But none of this is relevant to the instant case where Arbitrator Goldberg was asked to interpret a complicated

modification of a wage formula in a set of circumstances which the IUEC and NEII did not discuss at the time of the negotiations.

The IUEC relies upon *Detroit Coil Company v. International Association of Machinists and Aerospace Workers, Lodge 82,* 594 F.2d 575 (6th Cir. 1979), *cert. denied,* 444 U.S. 840 (1979), a case in which the Sixth Circuit overturned an arbitrator's award where the Court found that there was *"no evidence in the record"* which would allow the arbitrator to reach the conclusion that the parties *"to any extent* waived compliance with" the collective bargaining agreement therein. There is simply no similarity between *Detroit Coil* and the instant case because there is ample support for Arbitrator Goldberg's decision in the instant case.

In *Textile Workers Union No. 1386 v. American Thread Co.,* 291 F.2d 894 (4th Cir. 1961), the arbitrator therein "dispensed his own brand of industrial justice" contrary to the terms of the collective bargaining agreement. The arbitrator therein expressly found an employee to have committed actions which constituted just cause for discharge under the collective bargaining agreement but, contrary to this finding, the arbitrator nevertheless ordered the employer to reinstate the employee. From both a legal and factual viewpoint, this situation is far different from the instant case where Arbitrator Goldberg's opinion evaluates conflicting testimony and reaches a conclusion by interpreting ambiguous contract language through examination of the bargaining history which preceded the execution of the collective bargaining agreement. There is no inconsistency in Arbitrator Goldberg's opinion; Arbitrator Goldberg simply reviewed all of the evidence and interpreted the contract accordingly.

In *Clinchfield Coal Company v. District 28, United Mine Workers of America,* 720 F.2d 1365 (4th Cir. 1983) the collective bargaining agreement prohibited the licensing of coal mining "operations" which "resulted" in layoffs of the licensor's

employees. The arbitrator therein found that the licensing of coal "lands" violated the collective bargaining agreement even though it was clear that the licensing of the coal "lands" preceded the layoffs by many years and did not "result" in the layoffs. The Fourth Circuit vacated the arbitrator's award because (1) the arbitrator had ignored the clear distinction between coal "operations" and coal "lands" and (2) the arbitrator had not found any causal relationship between the licensing and the layoffs. It cannot be said that Arbitrator Goldberg ignored any relevant facts or provisions of the collective bargaining agreement. To the contrary, to the extent that the collective bargaining agreement is ambiguous, Arbitrator Goldberg examined the history of bargaining to ascertain the intent of the parties.

In *Pacific Motor Trucking Co. v. Automotive Machinists Union,* 702 F.2d 176 (9th Cir. 1983) the arbitrator therein refused to permit an employer to demote a working foreman even though the arbitrator recognized that the collective bargaining agreement expressly gave the employer discretion over the working foreman position. Again, unlike the instant case, the arbitrator in *Pacific Motor Trucking* "dispensed his own brand of industrial justice" contrary to the collective bargaining agreement.

CONCLUSION

For the foregoing reasons, the IUEC's petition for a writ of certiorari should be denied.

Respectfully submitted,

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